

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7058

United States Court of Appeals

SECOND CIRCUIT

MORGAN ASSOCIATES, a Joint Venture of TERMINAL CONSTRUCTION CORPORATION, THE DIC CONCRETE CORPORATION, UNDERHILL CONSTRUCTION CORP. and NAGER ELECTRIC COMPANY, INC.,

Plaintiff-Appellant,

—v.—

UNITED STATES POSTAL SERVICE, ELMER T. KLASSEN, POSTMASTER GENERAL, JAMES J. WILSON, Assistant General Counsel, UNITED STATES POSTAL SERVICE, CONTRACTS AND PROPERTY DIVISION,

Defendants-Appellees,

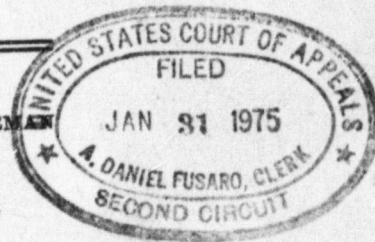
NAB-LORD ASSOCIATES, a Joint Venture of NAB CONSTRUCTION CORP. and LORD ELECTRIC Co., INC.,

Intervenor-Appellee.

APPELLANT'S BRIEF

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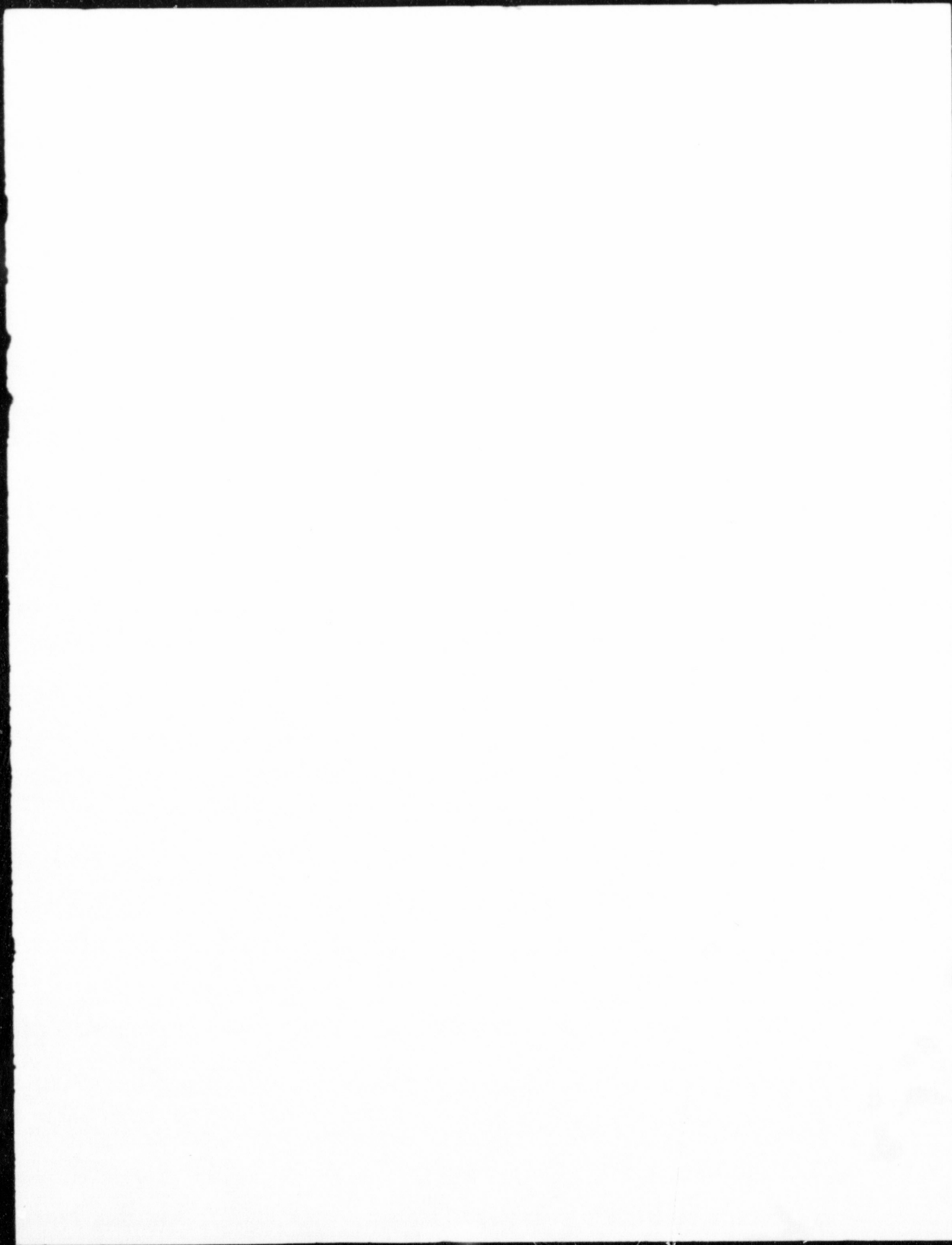


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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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MORGAN ASSOCIATES, a Joint Venture of
TERMINAL CONSTRUCTION CORPORATION,
THE DIC CONCRETE CORPORATION,
UNDERHILL CONSTRUCTION CORP. and
NAGER ELECTRIC COMPANY, INC.,

Docket No.
CA 75-7058

:

Plaintiff-Appellant,

v.

UNITED STATES POSTAL SERVICE,
ELMER T. KLASSEN, POSTMASTER GENERAL,
JAMES J. WILSON, Assistant General Counsel,
UNITED STATES POSTAL SERVICE,
CONTRACTS AND PROPERTY DIVISION,

:

Defendants-Appellees,

:

NAB-LORD ASSOCIATES, a Joint Venture of
NAB CONSTRUCTION CORP. and
LORD ELECTRIC CO., INC.,

Intervenor-Appellee.

- - - - - x

APPELLANT'S BRIEF

ISSUES PRESENTED FOR REVIEW

Whether the Appellant, (MORGAN ASSOCIATES) has standing, as an aggrieved bidder, to sue the UNITED STATES POSTAL SERVICE for injunctive relief, where there is an allegation

that the UNITED STATES POSTAL SERVICE (Appellee) has violated its administrative contracting regulations in connection with a proposed award to the apparent low bidder, NAB-LORD ASSOCIATES (Intervenor-Appellee).

STATEMENT OF THE CASE

This is an action by MORGAN ASSOCIATES, Appellant, for injunctive relief to prevent the UNITED STATES POSTAL SERVICE (hereinafter referred to as "USPS") and certain of its employees, from awarding a construction contract for the reconstruction and mechanization of the MORGAN STATION POST OFFICE, located in New York City, to NAB-LORD ASSOCIATES, Intervenor-Appellee, (hereinafter referred to as "NAB-LORD" or "Intervenor"), the apparent low bidder.

On November 21, 1974, Appellee, USPS, opened bids submitted in response to a previous advertisement by USPS for the reconstruction and mechanization work of the UNITED STATES POST OFFICE, MORGAN STATION, located in New York City.

NAB-LORD bid \$51,480,000.00, MORGAN ASSOCIATES bid \$54,444,000.00 and a third bid was received from Fischbach And Moore, Incorporated, in the amount of \$62,000,000.00.

The Invitation to Bidders provided that the Post Office must accept bids within sixty days of the opening, or by January 21, 1975. All bidders, however, extended the period for acceptance of their bids until February 20, 1975.

In an affidavit submitted to this Court in connection with Appellant's motion for a preference and other relief, Appellee, USPS, has advised the Court that an award of the contract will not be made before February 17, 1975 or, if this Court should affirm the order of the District Court, on the earlier of the two dates.

After the bid opening and on November 29, 1974, Appellant protested the bid submitted by NAB-LORD, the apparent low bidder, on various grounds. Reduced to their essence, Appellant charges that an award of the contract to NAB-LORD would constitute a serious violation of Postal Service contracting policy and the applicable regulations (R. 31).

USPS denied the bid protest on January 3, 1975 (R. 85). The instant action for injunctive relief was filed on January 10, 1975 (R. 40). On January 14, 1975, an Order To Show Cause for injunctive and other relief was presented to Judge Pollack, which was argued on January 17, 1975, together

with USPS'S motion to dismiss the complaint (R.14).

Also on January 17, an Application To Intervene in the action was presented by NAB-LORD and was at once consented to by all parties.

After oral argument on January 17, 1975, Judge Pollack announced the Court's Decision, viz., that the complaint would be dismissed on the ground that the Appellant lacked standing to sue and on January 20, 1975, a written Decision was filed.

In dismissing the complaint on the ground that Appellant lacked standing to sue, the Court relied on three major arguments:

- 1) that the rule in the Second Circuit is that an unsuccessful bidder lacks standing to sue to challenge the bidding process, citing Edelman v. Federal Housing Administration, 382 F.2d 594, 597 (Second Cir. 1967), (Moore, J.);

- 2) that even if the Court were to follow the rule enunciated in Scanwell Laboratories, Inc. v.

Shaffer, 424 F.2d 859 (D.C. Cir. 1970), the Scanwell Doctrine depends upon the existence of a right to review pursuant to §10 of the Administrative Procedure Act, 5 U.S.C. §702, and that the APA is not applicable to USPS; and

3) that Congress' intent as to USPS was that the interests of unsuccessful bidders be considered only through administrative action, without judicial review of any kind.

Each of the foregoing arguments will be considered infra.

POINT I.

EDELMAN V. FEDERAL HOUSING ADMINISTRATION,
382 F.2d 594 (Second Cir. 1967) (Moore, J.)
DOES NOT PROHIBIT THE ACTION AT BAR.

The Court below held that the rule in the Second Circuit is that an unsuccessful bidder lacks standing to bring suit to challenge the legality of the bidding procedure and cited Edelman v. Federal Housing Administration, 382 F.2d 594 (Second Cir. 1967). Reliance by the Court below on Edelman is misplaced for two very basic reasons. First, Edelman,

itself, involves a factual situation wholly distinguishable from that present in the matter at bar. Secondly, the Edelman Court relied for its authority on obiter dicta contained in Perkins v. Lukens Steel Co., 310 U.S. 113 (1940) Decis. p.6), which, in turn, was a case which had nothing whatever to do with the question of the standing of an unsuccessful bidder to challenge a government agency's violation of (or acquiescence in the violation of) its own competitive bidding regulations. The problem, thus, is not what Perkins v. Lukens actually holds but, what other Courts have quite mistakenly assumed that it held.

A brief review of the facts in Perkins v. Lukens should suffice to put this error in proper focus.

In Perkins, supra, an action was commenced by a group of iron and steel companies for injunctive relief to prevent the Secretary of Labor from putting into effect a minimum wage determination which would be applicable to all future bidders in the iron and steel industry throughout the nation.

The predicate of the plaintiffs' alleged standing

was described by the Supreme Court as follows:

"They [Plaintiffs] claim a standing by asserting that they have particular rights under and even apart from statute to bid and negotiate for Government contracts free from compliance with the determination made by the Secretary of Labor for their industry."

The Supreme Court went on to hold that the iron and steel companies were not parties intended to be benefited by the Public Contracts Act so as to permit them to attack the regulation which was enacted by the Secretary of Labor and which might affect them in future dealings in connection with Government contracts.

All of the subsequent language in the Perkins opinion which refers to bidding procedures being for the benefit of the public etc., is obiter dicta and moreover, was prompted by consideration of facts which are not at all similar to those at bar or to those in the Scanwell type case hereinafter referred to. Perkins was an attack by potential bidders on all future government contracts (not by a specific aggrieved bidder concerned with a specific contract for which bids had already been solicited), seeking to annul a regulation which a statute permitted the Secretary of Labor to enact. There was no attack

in Perkins by an unsuccessful bidder concerning a specific contract, alleging a particular violation of an agency enacted regulation, nor did Perkins involve any question of implied contract of fair dealing which has been judicially decreed to exist by virtue of an invitation to submit competitive bids.

In Edelman, supra, the Appellant's attack was, similarly, not directed to any violation by the F.H.A. of a specific regulation.

Quite the contrary, the F.H.A. Prospectus and Invitation To Bid, gave the F.H.A. carte blanche to dispose of its property as it deemed fit. As a matter of fact, all of the bids were ultimately rejected by the F.H.A. and the successful purchasers and arrangements were completed through private negotiations.

The Court, in Edelman, recognized the possibility that an action would lie on an implied contract theory but held that under the facts of Edelman, no such implied contract existed.

Thus, this Court stated as follows, at p.598:

" . . . In order to recover on a contract theory, appellant would have to prove an implied contract with the FHA to the effect that the agency would fairly conduct all aspects of the auction, including guaranteeing of each prospective bidder equal access to all relevant information. It can hardly be contended on the facts of this case that the FHA entered into such a broad contract." (emphasis added)

The "implied contract" theory is discussed infra in POINT II but it is important to point out at this juncture that it is exactly such an implied contract, which was missing in Edelman, (and which might have led this Court to reach an opposite conclusion) which is, in fact, present in the case at bar.

In the first instance, the Invitation For Bid which is the subject of the suit, specifically purports to be an invitation for a competitive bid.

The regulations the plaintiff alleges will be violated by USPS'S action in this case, are referred to at Pages 12 and 13 in the affidavit of ANTHONY M. DINALLO, sworn to January 13, 1975. Insofar as they are applicable to the issues of standing, in the light of the Edelman case, they require fair and open competition for all Postal Service Procurement.

Thus, while in Edelman, this Court found no "intent" in the FHA regulations or in the Invitation To Bid or in the conditions of sale which would guarantee all bidders any measure of fair conduct, such an "intent" is manifest in the plainest and most unmistakable language of the regulations in question which lay out a policy of fair competition which is arguably intended to benefit all bidders.

To put the proposition another way, the competition required by the regulations makes the interest sought to be protected by the Appellant arguably within the zone of interests which is protected by the regulations. Ass'n of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970).

POINT II.

ASSUMING ARGUENDO THAT THE EDELMAN CASE PROHIBITS THE INSTANT ACTION, THE COURT SHOULD RECONSIDER THE EFFECT OF ITS HOLDING IN EDELMAN AND FOLLOW THE RULE ENUNCIATED IN SCANWELL LABORATORIES, INC. v. SHAFFER, 424 F.2d 859, (D.C. CIR. 1970) AND KECO INDUSTRIES, INC. v. UNITED STATES, 428 F.2d 1233, 192 Ct. Cl. 773 (1970).

In Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859 (D.C. Cir. 1970), the Court of Appeals considered the Supreme Court's Decision in Perkins in detail:

"Appellee makes much of the Supreme Court's decision in Perkins v. Lukens Steel Co., 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1103 (1940), in which the Public Contracts Act was interpreted to be an enactment for the protection of the government rather than for those contracting with the government. The plaintiff in that case was therefore denied standing to secure review of wage determinations allegedly arrived at as a result of erroneous statutory interpretation.

"It must be remembered that Perkins was decided during the heyday of the legal right doctrine, and before the passage of the Administrative Procedure Act. The Court therefore followed the reasoning of its earlier cases in declaring:

"We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction * * * was based * * *. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.

"310 U.S. at 125, 60 S.Ct. at 875. Professor Davis has very discerningly seen the fallacy of the Court's thinking in this decision and has devised a more logical and more consistent basis for viewing such situations:

"What the court did not inquire into in the Lukens opinion is why the companies which are adversely affected by the asserted misinterpretation of the statute should not be enlisted as natural law enforcers, whether or not a legal right of the companies is violated. The opinion was written in terms of what 'the Government' may do in making contracts; a more refined view would be that government officers were making contracts on behalf of the government, that Congress is also a participant in the

exercise of the government's proprietary functions, and that the most practicable way to keep the government's contracting officers within their statutory powers is by letting complainants like those in the Lukens case obtain judicial review of the officers' action.⁹

"This is a powerful argument for allowing the plaintiff in the current case the requisite standing to challenge the governmental action of which it complains. Regardless of the merits of plaintiff's case, it should be granted the right, if possible, to make a prima facie showing that the government's agents did in fact ignore the Congressional guidelines in the manner in which they handled the granting of the contracts. If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits, at least until or unless this country adopts the ombudsman system used so successfully as a watchdog of government activity elsewhere.

"Appellee's reliance on Perkins is ill founded."

The Court below interpreted Scanwell, supra, as being based on and requiring jurisdiction under the Administrative Procedure Act, 5 U.S.C. §702. This is not so. The Scanwell Court, in reviewing the principles involved and in ultimately holding that Perkins did not prohibit the plaintiff in Scanwell from suing, quoted at length from its own decision in Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955), and emphasized the point that the question of whether a plaintiff has standing to sue under §710 of the APA is irrelevant and that the Court may

proceed in the exercise of its general equitable powers.

This precise point was developed further in Keco Industries, Inc. v. United States, 428 F.2d 1233 Ct Cl. (1970), which was called to the District Court's attention below but not considered in the Court's opinion.

In Keco, an aggrieved bidder brought an action for money damages based upon the alleged violation of contracting regulations.

It is important to note that, in Keco, APA jurisdiction was essentially irrelevant since Court of Claims jurisdiction to award money damages is separate and apart from any jurisdiction which would otherwise accrue to a District Court under APA. In other words, if the only basis of jurisdiction in Keco was APA, it is submitted that the Court of Claims would not have had jurisdiction to award money damages.

The Court of Claims, in considering the entire history of the standing question and the implied contract theory, supra, which was alluded to in this Court, Edelman, supra, was most persuasive. We set forth here at length for the benefit of this Court the relevant section of the Keco decision:

"The first issue which must be decided is whether plaintiff has standing to sue. Defendant urges the court to follow the long-standing rule in regard to suits by bidders, which is that most statutes governing the awarding of bids by governmental agencies are enacted for the benefit of the public, who are served by these agencies, and not for the benefit of the bidders. As a result, the general rule has been that bidders have no right to sue on the ground that the provisions of a bidding statute have been violated. Heyer Prods. Co. v. United States, 135 Ct.Cl. 63, 68, 140 F.Supp. 409, 412 (1956); see Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); American Smelting & Ref. Co. v. United States, 259 U.S. 75 (1922); United States v. New York & Porto Rico S.S. Co., 239 U.S. 88 (1915). On the other hand, plaintiff contends that this general rule prohibiting suits by wronged bidders should no longer be accorded any weight as it is not in the public interest. Plaintiff also urges that, regardless of this rule, it does have standing based on Heyer Prods. Co. v. United States, supra, and Scanwell Laboratories, Inc. v. Thomas, No. 22,863 (D.C. Cir., Feb. 13, 1970).

"The Heyer case dealt with a situation where the plaintiff was the low bidder on a Government contract, and yet the contract was awarded to a company which had submitted a bid almost twice as great as plaintiff's. Plaintiff alleged that the award by the agency was not made in good faith but was in retaliation for testimony plaintiff had given against the agency in a Senate hearing. This court held that, while still recognizing that bid statutes are for the benefit of the public and not bidders, nevertheless, it is an implied condition of a request for bids that each one will be honestly considered, and the bid which, in the honest opinion of the contracting officer, is the one most advantageous to the Government will be accepted. Consequently, it was held in Heyer that, assuming the facts as alleged by plaintiff were true, defendant had breached its implied promise to plaintiff since it had already

decided prior to the opening of the bids who would receive the contract award. The court felt that the advertisement for bids was nothing but a sham, a fraud, and a false representation that all bids would be honestly considered.

"In the very recent case of Scanwell Laboratories, Inc. v. Thomas, supra, the United States Court of Appeals for the District of Columbia Circuit discussed in great detail the question of whether a wronged bidder should have standing to sue. In that case, the plaintiff, who was the second low bidder on a contract dealing with instrument landing systems, argued that the bid of the low bidder was nonresponsive and should have been declared null and void since it was in violation of one of the provisions of the invitation for bids.⁶ In dealing with the theory that bid statutes are enacted for the public and not bidders, the Scanwell court stated:

'The public interest in preventing the granting of contracts through arbitrary or

5 In the Heyer case, this court considered only the question of whether plaintiff had alleged a cause of action sufficient to warrant a trial of the merits. In a subsequent case, Heyer Prods. Co. v. United States, 147 Ct.Cl. 256, 177 F.Supp. 251 (1959), this court ruled that plaintiff's bid was not rejected in bad faith or arbitrarily or capriciously. Instead, it was found that plaintiff's bid was rejected because the sample submitted did not comply with the testing specifications.

6 The provision required that the bidder must already have an operational system installed and tested in at least one location. Plaintiff alleged that the low bidder in this case did not have a system installed in one location, nor did it have a certificate of performance on an FAA flight check.

'capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a 'private attorney general'.

"Id. at 10. In addition the circuit court of appeals found that the approach taken by the Supreme Court in such cases as Perkins v. Lukens Steel Co., supra, has been legislatively reversed by the Congress, so that now Congress clearly 'favors review for those who are likely to be injured by illegal agency action in the context of government contracting'. Id. at 16. The court in Scanwell, therefore, concluded that where 'a prima facie showing of illegality is made, the question is uniquely appropriate for judicial determination; a plea that such actions are reserved to agency discretion will not be allowed to deny review.' Id. at 30.

"We feel that, as a result of Scanwell, a party, who can make a prima facie showing of arbitrary and capricious action on the part of the Government in the handling of a bid situation, does have standing to sue. At the same time, the decision of this court in Heyer also indicated that there were some instances in which a bidder would be allowed to bring an action against the Government. Even though the Heyer case was concerned with a situation where there was strong evidence of bad faith and intentional fraud on the part of the Government, we do not feel that Heyer was intended to be limited only to such an obvious type case; nor do we feel that Heyer was meant to apply only to those situations involving favoritism or discrimination. But see Robert F. Simmons & Associates v. United States, 175 Ct.Cl. 510, 360 F.2d 962 (1966).⁷ Instead, we

⁷ There have been a number of cases in this court in which a bidder has sought to recover damages based on the Heyer decision. However, in none of these cases was the plaintiff allowed to recover. Trans. Int'l Airlines, Inc. v. United States, 173 Ct.Cl. 312, 351 F.2d 1001 (1965); Green Manor Constr. Co. v. United States, 169 Ct.Cl. 413 (1965); Iscow v. United States, 161 Ct.Cl. 875 (1963); Locke v. United States, 151 Ct.Cl. 262, 283 F.2d 521 (1960); Keco Indus., Inc. v. United States, 149 Ct.Cl. 837 (1960), cert. denied, 305 U.S. 815 (1961).

find that Heyer stated a broad general rule which is that every bidder has the right to have his bid honestly considered by the Government, and if this obligation is breached, then the injured party has the right to come into court to try and prove his cause of action. Thus, even without Scanwell, we feel that plaintiff should be allowed to maintain this action based on the decision in Heyer.

"However, Scanwell, with its very complete and thorough coverage of the 'standing' question, appears to conclusively settle the issue in favor of plaintiff in this case. The court in Scanwell started out with a discussion of the early developments in the area of 'standing to sue,' such as the 'legal right' theory, as espoused in Frothingham v. Mellon, 262 U.S. 447 (1923), and the 'person aggrieved' theory found in FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940). Another development came in the case of Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942), in which the Court allowed a person to assert a position which protected a public rather than a specific private interest. The court in Scanwell was particularly in agreement with this Scripps-Howard decision since it felt that 'there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring those procedures can vindicate their very real interest, while at the same time furthering the public interest.' Scanwell Laboratories, Inc. v. Thomas, supra at 10.

"With the passage of section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (Supp. IV, 1965-68),⁸ Congress repeated through legislation what the judiciary had already said in prior cases. Later cases have since made it

⁸ This provision of the Administrative Procedure Act reads as follows:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

clear that judicial review of agency action will not be denied unless there is clear and convincing evidence of a contrary legislative intent. Abbott Laboratories v. Garner, 387 U.S. 136 (1967). It was found in Scanwell that in the field of Government contracting there was no such contrary legislative intent. After showing how the approach of the Supreme Court in Perkins had been legislatively reversed by Congress, the Scanwell court then proceeded to discuss some more recent cases in this area. The conclusion was that the trend of those cases indicates that allegations of illegality such as those made by the plaintiff in Scanwell constitute a sufficient basis for standing. The court placed particular emphasis on Friend v. Lee, 221 F.2d 96 (1955), which held that, even in the absence of the language of the Administrative Procedure Act, a prima facie showing of arbitrariness would be enough to entitle plaintiff to a hearing. Thus, the Scanwell court concluded that, with both a prima facie showing of abuse of discretion and with the language of the Administrative Procedure Act, applying in full, there was no way that it could justify denying plaintiff a right to sue.

"We are persuaded by this very thorough presentation in Scanwell that the law, as it now stands, supports plaintiff's position, allowing it the right to maintain this action. We cannot agree with defendant's argument that Scanwell must be limited only to those cases in which plaintiff is seeking to void the award of a contract. The holding of Scanwell is broad enough to grant standing to a party seeking personal money damages as well as to one acting as a quasi attorney general for the benefit of the public. Regardless of the fact that plaintiff in the instant case is seeking money damages, it is still requiring the Government to enforce its regulations fairly and honestly and treat all bidders without discrimination. Thus, plaintiff is acting both for itself and the good of the public. See Associated Indus., Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943). We conclude, therefore, that, based on the Scanwell and Heyer cases, plaintiff should be allowed standing to maintain this action, provided it can give prima facie evidence of arbitrary and capricious action on the part of defendant."

We would also note, parenthetically, that, at least one District Judge in this Circuit has cited the Scanwell Decision with approval. City Chemical Corp. v. Shreffler, 333 F. Supp. 46 (S.D.N.Y. 1971) (Gurfein, J.).

POINT III.

THE COURT BELOW ERRED IN HOLDING THAT IT WAS CONGRESS' INTENT THAT THE USPS BE PERMITTED TO VIOLATE USPS CONTRACTING REGULATIONS, WITHOUT JUDICIAL REVIEW.

The District Court's opinion (p.7 et seq.) makes the conclusory assertion that the Postal Reorganization Act of 1970, does not include a grant of judicial review of contract bids, etc., and, further, that this exclusion from APA is a result of express Congressional recognition and determination by Congress that unsuccessful bidders not be entitled to judicial scrutiny.

As we have argued above, we do not consider that APA jurisdiction is required in order to permit the Court to assume jurisdiction for the purposes indicated in this case, based upon the Court's characterization in Friend v. Lee, supra, as the "... exercise of its general equitable powers."

Nevertheless, the Congressional intent referred to by the District Court does not by any means explicitly exclude review of a violation of USPS regulations.

The text of §410 (a) is as follows:

"Application of other laws

Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, no Federal law dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service."

While the language of §410 (a) is unquestionably murky, a close reading of it makes clear that the USPS is exempted from application of only so much of Chapters 5 and 7 of Title 5 (APA) as deal with the eight substantive categories of Federal law recited immediately before the reference to "chapters 5 and 7 of Title 5". These categories being "public or Federal contracts, property, works, officers, employees, budgets or funds."

The complaint in this case is not that USPS has done anything at variance with any Federal law (including

the APA) dealing with public or Federal contracts but, rather that, having adopted its own contracting regulations (free from the requirements of APA and the seven or eight categories referred to in §410 (a) and predicated thereon an invitation for competitive bids that USPS is not now free to violate those regulations.

Nor are there any judicial holdings relied on by the District Court or Appellees which support the proposition that USPS is entirely free from the strictures of APA, which is the proposition urged by USPS below. Although, as a matter of fact, the Postal Service has since its inception maintained that it is wholly immune from APA, there has been no judicial sanction of that interpretation.

In Pent-R-Books, Inc. v. The United States Postal Service, 328 F.Supp. 297 (E.D.N.Y. 1971), the Court stated:

"We express no opinion on the question of whether 39 U.S.C. §410 (a) makes all the provisions of 5 U.S.C. §553 inapplicable, as the Postal Service notice of May 5, 1971 states."

In dealing with a related question, the United States Court of Claims has held in analyzing §410 (a),

that that section " . . . appears to refer not to procedure and jurisdiction but to Postal Service's discretion to contract according to its own needs and regulations." Butz Engineering Corporation v. United States, 499 F.2d 619, 626, (Ct.Cl. 1974).

In short, it is one thing to argue that the Postal Service has authority free from APA requirements to make its own contracting regulations, etc., but quite another to say that once it has done so, it is free to violate those regulations, without judicial restraint.

POINT IV.

ANSWERING APPELLEES' ANTICIPATED ARGUMENTS:

It is anticipated that the Government will contend in its answering brief that the opinion of the Court below may be sustained on grounds other than those given.

The first such ground upon which the Government has indicated it will urge affirmance of the District Court's dismissal of the complaint is that the regulation in question, §18-511, is freely permissive and freely

waivable and that, therefore, Appellant has suffered and can suffer no injury as a result of the USPS failure to honor its provisions.

There are two short answers to the bald statement of this proposition.

First, the requirements of §18-511 are not by their terms "waivable". The language is different. "No contract for construction of a project shall be awarded to a firm or person that designed the project, except with the approval of the Assistant Postmaster General, Real Estate And Buildings Department or his authorized designee." No such approval has been given and none has been requested as of the date of this writing.

Second, to read §18-511, to allow the approval of such an award after all bids have been submitted rather than by open advice to all bidders at the time of invitation to bid that the prohibition will not be imposed, would clearly create an inequity wholly incompatible with the expressed intent of the regulations, when read in their entirety, to provide for open competitive bidding through "formal advertising". 1-301.1; 1-304.1; and 18-512.

It may be noted in passing that if the argument is made that an award to a designer may be in the "public interest" because of lower cost, we may answer that it is reasonably predictable that the "designer" or "insider" will almost always come up with a lower price by virtue of his more precise and detailed knowledge of the exact requirements of the project. If the lowest price were the sole determinant of whether the public interest is met, than - obviously - there would be neither need for nor impetus to open competitive bidding. But it is long and clearly recognized far beyond the need for citation of authority, that in our complex economy, the "public interest" may well be better served by the preservation of free, open and fair competition than by a search for the "lowest price". For the "lowest price" obtained today as a result of allowing insiders to obtain and exercise an unfair advantage, may well turn out to be the "highest price" to the public tomorrow.

The Government is also expected to argue that the exact language of 18-511 has, in fact, been observed and that no award has been made or is about to be made with "a firm or person that designed the project".

The affidavit of WILLIAM J.S. SEIGH sets out in detail the relationship of the individuals involved in the various corporate entities. The individuals who "designed" the project are all now officers of or employed by ROHR-PLESSEY CORPORATION. One of these persons, PAUL HENDRICKSON, who was Director of Operations, Department of Research And Engineering for the Postal Service, became ROHR-PLESSEY'S President, while certain others after leaving the Postal Service, were hired as consultants by the design firm employed by the Postal Service to develop the final construction requirements, drawings and specifications for the reconstruction of the MORGAN Facility and were thereafter, employed by ROHR-PLESSEY. ROHR-PLESSEY, it is alleged, originally became involved with the NAB-LORD interests as a prospective joint-venturer but, for reasons which now seem rather obvious, decided that its interests were better served by assuming the position of exclusive subcontractor to NAB-LORD under a "tie-in" arrangement and refused to give a price as a subcontractor to any of the other potential bidders for the MORGAN Facility project.

If one were to read 18-511 as restrictively as the Government would now have this Court read it, the language becomes meaningless. Assuming that we are dealing with a

project of any magnitude, clearly no "person" who designed such a project is going to be the general contractor. Giving 18-511 the interpretation proposed by the Government would permit a situation where - to construct a scenario - Mr. John Smith, Architect, might design a project and the contract might then be awarded, with perfect impunity, to Smith Construction Corp., of which Mr. Smith, the individual, was the President and sole stockholder. The variations are endless and limited only by the ingenuity of the party seeking to avoid fair and open competition.

Similarly, it is hardly likely that a "firm" which designed a project would also be in the general contracting business and in a position to bid for the construction contract itself.

Obviously, §18-511 must be given an interpretation consonant with its obvious intent, i.e., to bar those with an unfair advantage from competing with others who do not have the same inside information that they possess. To do otherwise, would be to attribute to the USPS an intent to promulgate meaningless regulations which are at the same time highly deceptive and wholly at odds with general governmental policy.

CONCLUSION

In a sense, this distinction between the freedom to enact regulations pursuant to statutory authority and the power to violate those regulations once enacted at will, brings one to full circle to the facts which were present in Perkins and the cases which have been decided since that time.

Generally speaking, where the attack has been directed towards the Administrator's ability to regulate or not, the so-called aggrieved bidder has no standing to challenge the Administrator's action. Where, however, the attack is premised on the agency's violation of its own regulations, as in Scanwell, supra, the Courts have permitted the aggrieved bidders standing to challenge the arbitrary action via the implied contract theory, APA jurisdiction, or based on the Courts' inherent equitable power.

Respectfully submitted,

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Two (2)
Service of three (3) copies of the within Appellant's Brief
is admitted this 31st day of January 1975

McDonough School of Nursing

INTERVENOR-ADDUCEE

DEFENDANTS - APPELLEE

